low. The deposit is to be paid to the respondent on account of taxed costs. In respect of costs – certificate for two counsel.

Appeal dismissed.

Solicitors: *Jayasuriya Kah & Co.*

KIN NAM DEVELOPMENT SDN. BHD. v. KHAU DAW YAU

[F.C. (Salleh Abas C.J. (Malaya), Seah & Syed Agil Barakbah F.JJ.) August 24, 1983 & January 20, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No. 23 of 1981]

Contract – Contract for purchase of land and house – Application for sub-division of land – Special condition imposed that portion of land reserved for bumiputra – Whether contract discharged by frustration – Building contracts entered into by person not proprietor of land – Issue not pleaded – Whether breach of rules affects validity of contracts – Housing Developers (Control and Licensing) Rules, 1970, rr. 11 & 17 – Contracts Act, 1950, s. 24.

Housing Developers – Contract for purchase of land and house – Special condition imposed that portion of land reserved for bumiputra – Whether contract discharged by frustration.

This was an appeal from the decision of George J. reported in [1983] 1 M.L.J. 335. The appellant in this case had proposed to develop two pieces of land in Kuantan into a housing estate. One of the pieces of the land belonged to him and the other belonged to a company, the Futo Trading Company. The appellant invited members of the public to book the lots and booking applications were signed. All the lots were booked before approval for conversion and subdivision of the land was obtained. When the appellant applied for conversion and subdivision, this was granted subject to the condition that a number of the lots should be reserved for bumiputra. The appellant decided not to build any of the houses and action was brought by some of those who had booked the lots claiming specific performance of the contract. At the trial the appellant contended that he was not liable as the booking did not constitute a binding contract and that even if it did so, the contract was rendered not only impossible of performance but also illegal by the imposition of the special condition. George J. overruled the appellant's arguments and gave judgment in favour of the plaintiffs in the case in the form of damages. The appellant appealed. On the appeal counsel for the appellant did not raise the issue whether acceptance of the booking constituted a binding contract between the appellant and the purchasers, (the ruling of the trial judge in this issue being unassailable).

Held: (1) to invoke the doctrine of frustration the appellant must show that the completion of every one of the contracts was in substance a different obligation from what had previously been agreed to, that is, a new agreement altogether. In this case the substance remained the same. Each of the contracts was and still is for the sale of houses which the appellant agreed to build. The special condition imposed by the Pahang State Government in no way changed the substance of the appellant's agreement with its purchasers;

(2) it was no defence for the appellant to say that the special conditions were completely unexpected because under the law the State Government could even refuse the application altogether. The appellant had no good reasons to expect that its application would be approved at all. As it took the risk so it must pay for it;

(3) in regard to the land owned by Futo Trading Company, there was a breach of the Housing Developers (Control and Licensing Rules, 1970) but the question whether non-compliance with the rules rendered the contracts illegal by virtue of section 24 of the Contracts Act was not pleaded by the appellant and there was no proper factual basis upon which a ruling could be made;

(4) in any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses. The Rules therefore do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers;

(5) the appeal must be dismissed and the ruling of the learned Judge that the respondents are entitled to damages only instead of specific performance confirmed.

Cases referred to:

(1) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.* [1981] 1 M.L.J. 56.
(2) *Taylor* v. *Caldwell* (1863) 3 B & S 826; 122 E.R. 309
(3) *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, 729.
(4) *Jackson* v. *Union Marine Insurance Co. Ltd.* (1874) L.R. 10 C.P. 125

FEDERAL COURT.

D. J. Puthucheary (*K. Y. Foo* with him) for the appellant.

A. Ramanathan for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the Court): This is an appeal from the decision of V.C. George J. arising out of the trial of a consolidation of seven civil suits, namely: Civil Suits Nos. 256, 237, 258, 259, 274, 263 and 257 of 1978.

The facts which are not in dispute are as follows: The appellant, a housing developer under Licence No. 232/72 issued on September 18, 1972, was proposing to develop two pieces of land in Kuantan into a housing estate to be known as Lucky Garden.

The first piece, namely Lot 953 held under EMR No. 530 was a piece of rubber land registered under the appellant's name. The appellant applied to Pahang State Government for conversion and sub-division of the land into 32 building lots of which 9 lots were for semi-detached houses and the remaining 23 lots for single-storey terraced houses. The application was made on December 12, 1972 and approval was given on October 28, 1974. In the meantime, presumably in response to the appellant's invitation members of the public started to book the proposed lots with buildings to be erected thereon. They even did so before the appellant had obtained its developer's licence. The plaintiff in CS No.237/78 made a booking as early as August 18, 1972, whilst the three plaintiffs in CS Nos. 256, 258 & 263 of 1978 booked their lots on December 12, 1972, the day when the appellant submitted its application for conversion and subdivision of the land, each paying $600.00 booking fee – upon signing a booking form. All the 32 proposed subdivided lots were booked before approval for conversion and subdivision was obtained. The approval which the Pahang State Government gave was made subject to a condition to the effect that at least 3 out of the 9 semi-detached housing lots and 7 out of the 23 terrace housing lots should be reserved for Pahang State Economic Corporation which would hold them for would-be Bumiputra purchasers. In other words, 10 building lots with houses built on them should be reserved.

The second piece of land was lot 948 held under EMR 3659. This land was also a piece of rubber land formerly registered in the name of a Bumiputra woman, named Tengku Sepiah. She transferred it to Futo Trading Company Sdn. Bhd (Futo) for the purpose of developing it into a housing estate in return for the 4 units of semi-detached houses to be built thereon for her. As Futo had no developer's licence, it entered into an arrangement with the appellant whereby the land was to be subdivided into 4 semi-detached housing lots and 24 terrace-housing lots. Application for conversion and subdivision was approved by the Pahang State Government on November 20, 1973. The 4 semi-detached housing lots were completely built for Tengku Sepiah, but the 24 terrace-housing lots remained unbuilt. All the 24 lots were booked by members of the public, of whom were the plaintiffs in C.S. Nos. 274, 257 and 259 of 1978, each paying a booking fee of $500.00 upon signing a booking-form. The booking transactions were between the respondents and the appellant, although the land was not registered in its name. Like the first piece of land, the approval of conversion and subdivision of the second piece of land was also given subject to a special condition that at least 30% of the houses built thereon should be reserved for Pahang State Economic Corporation for would-be Bumiputra purchasers.

The 32 lots in respect of the first piece of land and the 24 lots in respect of the second piece of land were all booked before conversion and subdivision approval was obtained and they were all booked by non-Bumiputra purchasers. It is therefore clear that compliance with the special condition would mean that 10 houses in respect of the first piece of land and at least 8 houses in respect of the second piece of land would have to be reserved. It is a matter of difficulty, if not impossibility for the appellant to determine who amongst these buyers should give up their purchases. A suggestion by Futo to determine them by ballots was not acceptable to the purchasers. On the other hand, if the appellant were to proceed to complete the contracts with all its purchasers it would have to go against the special condition of the conversion and subdivision approval. This the appellant is not prepared to do because it accepted that the special condition is binding on it.

The appellant, therefore, decided not to build any of the houses, except the four units of semi-detached houses meant for the previous owner of the second piece of land. The result is that the appellant was taken to Court in these seven consolidated civil suits wherein each plaintiff as a purchaser claims specific performance of the contract.

The appellant denied that it was liable at all. It contended that the booking which each plaintiff made of the lot and the house to be built thereon did not constitute a binding contract and that even if it did so, the contract was rendered not only impossible of performance but also illegal by the imposition of the special condition.

V. C. George J. who heard the case in the Court below overruled the appellant's arguments and held that the appellant was liable and accordingly gave judgment in favour of the plaintiffs in the form of damages which are to be assessed later. Hence this appeal.

Before us counsel for the appellant did not raise the issue as to whether acceptance of the booking constituted a binding contract between the appellant and the purchasers. We think that it is very proper for him to omit it as the ruling of the learned trial judge on this issue is unassailable. (*Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck & Anor.*[1])

In view of the different issues involved in this appeal, we propose to divide the appeal in two parts. The first part relates to Civil Suits Nos. 237, 256, 258 and 263 of 1978, which arose from the first piece of land to be developed by the appellant. The second part relates to Civil Suits Nos. 259, 257 and 274 of 1978 which arose from the second piece of land, which the appellant agreed to develop under an agreement with Futo.

The issue involved in the first part of the appeal is whether the contracts were discharged by frustration whilst the issue in respect of the second part is whether the contracts were void for illegality for having contravened the Housing Developers' (Control and Licensing) Rules 1970.

First Part of the Appeal:

Counsel for the respondent submitted that the contracts were not frustrated because the special condition has no force of law, it being only a mere request which the appellant could ignore. In our view the special condition has the force of law; it being imposed as "requirements" under section 136(1) of the National Land Code. Under the section a subdivision can only be approved if it is in compliance with any "requirements imposed, plan approved or any direction given by the Pahang State Government" (see paragraphs (b) and (c) of section 136(1) of NLC). Surely the special conditions are "requirements" imposed under the section.

We now turn to consider whether the doctrine of frustration has application to the facts of this case.

The doctrine of frustration which operates to terminate a contract is of recent origin. (see *Taylor* v. *Caldwell*[2]). It occurs in a situation where due to a change of circumstances a contract is rendered legally and physically impossible of performance. The doctrine is an exception to the general rule as to an absolute contract in that a person who specifically undertakes an absolute obligation cannot afterwards claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for. The basis of the doctrine is, as stated by Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham. UDC*[3] to be "not hardship or inconvenience or material loss", but "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for". In *Jackson* v. *Union Marine Insurance Co. Ltd.*[4] the charterers were held justified to throw up their contracts with the shipowners when the chartered ship was, due to damages, unable to load the agreed cargo as the loading of cargo after the ship had been repaired would have been "a new adventure" or "a new agreement". Bramwell B., held that the parties were discharged by the ship's inability.

In the present appeal there can be no doubt that it would be a heavy financial burden on the appellant to build the houses contracted for and to complete the contracts with its purchasers because costs have since spiralled. But this point is not a relevant factor for calling the doctrine of frustration into play. To invoke the doctrine the appellant must show that the completion of every one of these contracts is in substance a different obligation from what it had previously agreed to, i.e. a new agreement altogether. In our view the substance remains the same. Each of these contracts was and still is for the sale of house which the appellant has agreed to build. The special condition which enjoins the appellant to reserve 30% of the houses (in practical terms 10 houses) to be built for the Pahang State Development Corporation may well result in the impossibility of the appellant to determine with fairness who amongst its purchasers are to be deprived of their contracts and who to have their contracts performed, especially when the Pahang State Government gives no indication, nor guidance as to how the appellant should go about in complying with the special condition. To choose certain particular purchasers as those who should lose out even at random may be arbitrary and cause an injustice on them, unless they all agree. But despite this difficulty or impossibility the special condition does in no way change the substance of the appellant's agreement with its purchasers. It can still perform 70% of the contracts, although it may not be able to do justice when choosing which contracts it should perform.

The booking was done and accepted before the land was sub-divided. There is no basis for the appellant to assume that its application for subdivision and conversion would be approved without conditions or even approved at all. It should have first waited for the decision of the Pahang State Government on the fate of its application before venturing to advertise and accept booking fees for the proposed subdivided lots. It is no defence for it to say that the special conditions were completely unexpected, because under the law the State Government could even refuse the application altogether, if it was so minded. The appellant had no good reason to expect that its application would be approved at all. As it took great risk so it must pay for it.

The appeal as regards the civil suits Nos. 237, 256, 258 and 263 must therefore be dismissed with costs.

Second Part of the Appeal:

As regards Civil Suits Nos. 274, 257 and 259 of 1978, counsel for the appellant submitted in the court below that since Futo, who is the proprietor of the land was not made a party to the booking transactions, whatever contracts which arose therefrom were illegal by virtue of Rule 11 (1) of the Housing Developers (Control & Licensing) Rules, 1960 – PU (A) 268/1970 and therefore null and void.

Rule 11 (1) provides as follows:

"11. (1) No licensed housing developer who is not the proprietor of the land upon which a housing development is carried out shall enter into any contract of sale of any housing accommodation in that housing development unless the proprietor of the land is also a party to such contract of sale and agreed to the sale of the land for the purpose specified in such contract of sale."

We know that breach of this rule by a housing developer renders him liable to be prosecuted for an offence under Rule 17 which is as follows:

"17. Any licensed housing developer who contravenes any of the provisions of these Rules shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding $3000 and for a second and subsequent offence to a fine not exceeding $5000 or imprisonment for a term not exceeding 6 months or to both such fine and imprisonment."

But what is the effect of the breach on the contracts? Neither the Rules nor the Act under which the Rules were made say anything. The only provision which is relevant in this context is section 24 of the Contracts Act, which is as follows:

"24. The consideration or object of an agreement is lawful, unless –

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Therefore, the question raised by counsel in the court below is whether non-compliance with Rule 11(1) renders the contracts illegal by virtue of section 24 of the Contracts Act.

This is a substantial question of law and facts which in our view should be pleaded in the appellant's statement of defence. Before this question could be answered the appellants should have at least pleaded the facts upon which they wish the court to give this legal result. They did no such thing in their statement of defence or in the agreed statement of facts. We, therefore, think that the matter should not be dealt with by the learned trial judge and the point should be left open, because there is no proper factual basis upon which a ruling could be made.

In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of section 24 quoted above, although the appellant may well be guilty of an offence under Rule 17 for contravening Rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.

In conclusion, we are of the view that the appeal should be dismissed with costs. We confirm the learned Judge's ruling that the respondents are entitled to damages only instead of speci-

fic performance. There will be an order that the court below should proceed to fix the damages.

The deposit should be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; H.Y. Lee & Hee.*

THE "MELANIE" UNITED ORIENTAL ASSURANCE SDN. BHD. KUANTAN v. W.M. MAZZAROL

[F.C. (Salleh Abas C.J. (Malaya), Seah & Syed Agil Barakbah F.JJ.) August 25, 1983 & January 20, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 296 of 1982]

Insurance – Insurance of vessel – Vessel grounded on sandbank at mouth of Kuantan river – Alleged failure to disclose earlier accident relating to vessel – Information given to agent of insurance company – Whether accident due to peril of the sea or due to lack of diligence – Whether there was total constructive loss of the vessel.

Shipping Law – Marine Insurance – Insurance of vessel – Total constructive loss – Applicability of English law – U.K. Marine Insurance Act, 1906 – Civil Law Act, 1956, s. 5(1).

This was an appeal from the decision of George J. reported in [1983] 1 M.L.J. 328. The respondent was the owner of a boat the "Melanie" which he had sailed from South Australia to Singapore and then to the east coast of Peninsular Malaysia. Upon arrival at Kuantan he did not enter the Pahang River but dropped anchor outside the river mouth at a point about 500 yards to the South. He left the boat and went ashore by getting a lift in a passing fishing boat. During the night the sea dragged the anchor and the boat closer to the shore and left it grounded in low waters. With the help of a fishing boat the "Melanie" was set free and finally towed into the river and safely anchored. Subsequently the respondent insured the boat with the appellant company through an agent of the defendant company. He had told the agent of the earlier grounding but this was not stated in the application. The vessel was taken out to sea by the respondent and when returning into the river the boat came into contact with the sand-bar at the mouth of the river. The boat was grounded and could not be salvaged. The respondent claimed the insured sum of $40,000.00 from the appellant company and judgment was given for him in the High Court. The appellant company appealed.

Held: (1) the omission by the respondent to state the earlier mishap in the proposal form was not his fault but that of the appellant company themselves for framing ambiguous questions. Such ambiguity must be resolved in favour of the respondent;

(2) it is settled law that where an agent is authorised to negotiate and settle terms of a proposal or delegated with a duty to investigate certain matters, the agent's knowledge is also the knowledge of the insurance company. In this case the learned judge was right in holding that the agent was acting as agent for the appellant company when he received the information about the earlier mishap from the respondent;

(3) on the facts of this case the learned judge was correct in holding that there was no way in which the respondent could have adopted to avoid hitting the sandbar, short of not venturing out to sea at all and that having regard to the position of the sandbar, even the most experienced navigator of the area, like the port pilot, could not have avoided the accident. The appellant's submission on the issue of negligence must fail;

(4) in view of the finding by the learned judge that the accident was caused by the boat striking a submerged sandbank which was marked in the charts to be a sea-lane, this could not be otherwise than a fortuitous danger, a danger which no human skill could possibly avoid and guard against. The danger having been created by the sea, the accident to the boat must be due to peril of the sea;

(5) the boat would be a constructive loss if the respondent could prove (a) that her abandonment was reasonable and (b) that on the date of the commencement of the action it was unlikely on the basis of the facts that existed that the boat could be recovered. In this case both questions must be answered in favour of the respondent.

Cases referred to:

(1) *Schoolman* v. *Hall* [1951] 1 Lloyd's Rep. 139, 142.
(2) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356.
(3) *Bawden* v. *The London, Edinburgh and Glasgow Assurance Co.* [1892] 2 Q.B. 534.
(4) *Ayrey* v. *British Legal and United Provident Assurance Co. Ltd.* [1918] 1 K.B. 136.
(5) *Evans* v. *Employers Mutual Insurance Association Ltd.* [1936] 1 K.B. 505.
(6) *Marstrand Fishing Co. Ltd.* v. *Beer* [1937] 1 All E.R. 158, 164.
(7) *Petros M. Nomikos Ltd.* v. *Robertson* [1939] 64 Ll. L.R. 45.
(8) *Rickards* v. *Forestal Land, Timber and Railways Co. Ltd.* [1941] 3 All E.R. 62.

FEDERAL COURT.

Cecil Abraham (*Wilfred S.J. Abraham* with him) for the appellant.

Shah Balendran for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the court): On November 20, 1977 the respondent, an Australian, who is a sailing enthusiast arrived in Kuantan waters in his boat called "Melanie", which he personally built and navigated single-handed from his hometown Purnside, South